

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

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| ROD STERLING |) | |
| Claimant |) | |
| V. |) | |
| |) | CS-00-0365-206 |
| SEARS ROEBUCK & CO. |) | AP-00-0449-527 |
| Respondent |) | |
| AND |) | |
| |) | |
| ACE AMERICAN INSURANCE CO. |) | |
| Insurance Carrier |) | |

ORDER

Claimant requested review of the February 7, 2020, Award issued by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on June 11, 2020.

APPEARANCES

Mitchell W. Rice appeared for Claimant. Clifford K. Stubbs appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board considered the same record as the ALJ and adopted the stipulations listed in the Award.

ISSUES

Respondent argues the Award should be affirmed. Claimant's permanent impairment is 7 percent to the body as a whole based on Dr. Pratt's evaluation. Claimant is not entitled to a permanent partial disability based on wage loss and task loss because his body as a whole impairment does not meet the statutory threshold of at least 7½ percent to the body as a whole and he is currently earning greater than 90 percent of his pre-accident average weekly wage. Finally, Respondent argues Claimant should be denied future medical because he failed to prove his need for future medical benefits.

The issues on appeal are:

1. What is nature and extent of Claimant's disability?

2. Is Claimant entitled to future medical treatment?

FINDINGS OF FACT

The ALJ ruled Claimant sustained a 7 percent functional impairment to the body as a whole and denied Claimant's request for future medical treatment.

Claimant worked for Respondent as a lead service technician for 27 years. Claimant went to homes and repaired appliances such as refrigerators, furnaces, air conditioners, washers, dryers, dishwashers, and helped other technicians. Claimant was paid \$23.09 an hour, plus overtime and commissions.

On May 26, 2016, Claimant was injured while attempting to remove a blower wheel from a dryer motor. He leaned over the top of the motor attempting to wrench off the blower wheel, when it finally loosened. Claimant felt an acute onset of pain in his right arm going up into his neck. He called the supervisor and was instructed to try and finish his route. Claimant went to the next service call, but experienced pain in his hands, chest wall, right elbow, right shoulder and bruising down his arm.

Claimant was provided an accommodated job until Respondent closed. Claimant, after two months, found another job working for an RV company performing electrical work and other troubleshooting tasks. He earns \$20 an hour plus overtime. He is also paid a commission for any parts he sells.

Claimant first met with Dr. Erik Severud, an orthopedic surgeon, on July 12, 2016, with right shoulder pain, pain up his arm into his neck, and numbness in his 3rd, 4th and 5th fingers on his right hand, loss of grip strength and decreased motion overhead. Dr. Severud noted Claimant had six physical therapy sessions with no improvement, prior to this visit. He also noted Claimant has a history of a labral tear in the right shoulder in 2010, which Dr. Severud treated. Claimant reported the pain became acute and constant on May 26, 2016, while working for Respondent. Claimant described the pain as aching, dull, sharp and throbbing. He reported the pain radiates through the elbow, shoulder and neck on the right side. He also reported bruising, decreased mobility, difficulty initiating sleep, joint instability, joint tenderness, waking up during the night, numbness, popping, tingling in the arms and legs.

Dr. Severud examined Claimant and diagnosed right shoulder pain and radicular pain in the right arm. C-spine films showed no evidence of fracture, normal alignment, calcification anteriorly from C4 to C6 and disc space narrowing at C6-7. Claimant also had right elbow complaints and Dr. Severud ordered an MRI for the elbow. He also recommended a closed MRI for the right shoulder and limited Claimant's lifting to 20 pounds.

Claimant received two MRIs of the right shoulder. The first MRI revealed no significant abnormalities. Claimant's condition did not improve and Dr. Severud ordered a second MRI of the right shoulder, which revealed a mild acromial surface tear of the supraspinous tendon at its insertion, as well as mild impingement of the supraspinous tendon by inferior osteophytosis of the AC joint. Claimant was diagnosed with a right rotator cuff tear. Dr. Severud opined the elbow pain was due to a muscle tear of the pronator and nothing could be done for that.

On January 18, 2017, Dr. Severud was asked to determine from the November 2016 MRI whether Claimant sustained an intervening accident or if the tear in the shoulder occurred due to the original work accident. Dr. Severud opined the partial tear of the supraspinatus tendon is related to the original work accident and the work accident was the prevailing factor in the partial tear.

Dr. Severud performed surgery on Claimant's right shoulder on April 21, 2017. Surgery provided some relief. Claimant was released on November 8, 2017, with permanent restrictions.

On January 29, 2018, Dr. Severud issued an impairment rating of 11 percent for the right upper extremity based on the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 6th Edition.¹

Dr. Severud assigned permanent restrictions maximum lifting to waist of 45 pounds occasionally, maximum carrying and lift to 25 pounds frequently, maximum overhead lifting 10 pounds occasionally, no pushing or pulling above 60 pounds, and no constant lifting or carrying above 10 pounds, with the right upper extremity.

Dr. Severud opined Claimant will not need any future medical treatment for the right shoulder in relation to the May 26, 2016, work injury.

Dr. Severud reviewed the task list of Terry Cordray and determined Claimant could perform 6 out of 8 tasks listed, for a 25 percent task loss.

Dr. George Fluter examined Claimant on March 13, 2018, at the request of his attorney. Dr. Fluter noted Claimant had right shoulder labrum issues several years ago with no surgical intervention. At the time of this examination, Claimant complained of pain in the right shoulder girdle, elbow, chest wall and numbness in the right hand.

Claimant described the pain as sharp, dull, and aching. Bending and twisting the right arm makes the pain worse but the pain sometimes stopped when these activities stopped. Medication made the pain better. He has been treated with surgery, medications

¹ Hereinafter referred to as *The Guides*.

and physical therapy, including cervical traction. He experiences numbness affecting the fingers of the right hand, and weakness of right grip.

Upon examination, Dr. Fluter diagnosed the following:

1. Status post work-related injury 05/26/16.
2. Right shoulder/upper extremity pain/dysesthesia.
3. Right shoulder impingement/tendonitis/bursitis.
4. Right shoulder internal derangement.
5. Status post right shoulder arthroscopy; 04/21/17.
6. Right elbow pain.
7. Probable light elbow tendonitis.
8. Probable right elbow epicondylitis.
9. Cervicothoracic strain/sprain.
10. Myofascial pain affecting the neck/upper back.

Dr. Fluter opined Claimant's May 26, 2016, work accident was the prevailing factor for Claimant's injury, need for medical treatment and disability.

Dr. Fluter assigned restrictions of:

1. Restrict lifting, carrying, pushing and pulling to 35 pounds occasionally and 15 pounds frequently (physical demand between light and medium).
2. Avoid holding the head and neck in awkward and/or extreme position.
3. Restrict overhead activities to an occasional basis.
4. Restrict activities at or above shoulder level using the right arm to an occasional basis.
5. Restrict activities greater than 24 inches away from the body using the right arm on an occasional basis.

Dr. Fluter assigned a permanent impairment rating of 13 percent to the body as a whole. Referencing table 15-34, page 475 of *The Guides*, he assigned permanent partial impairment to the right upper extremity of 12 percent for right shoulder due to range of motion deficits. He assigned permanent partial impairment to the right upper extremity of 7 percent for elbow range of motion deficits based on table 15-33, page 474 of *The Guides*. Using the Combined Values Chart, at pages 604-606, there is a total permanent partial impairment to the right upper extremity of 18 percent, which converts to a permanent partial impairment of 11 percent to the body as a whole. Dr. Fluter found a permanent partial impairment of 2 percent to the body as whole for a Class 1 soft tissue and non-specific conditions affecting the cervical spine, based on table 17-2, pages 564-566, of *The Guides*.

Dr. Fluter, opined given the nature of Claimant's neuromusculoskeletal conditions and impairments, future medical care is likely. Additional diagnostic testing is likely to include imaging studies and electrodiagnostic studies. Additional treatment also included prescription medications, physical therapy, interventional pain management procedures and/or surgery. Dr. Fluter opined Claimant may benefit from the use of a soft cervical (neck) collar during periods of activity. If used intermittently, it is unlikely that he would experience significant weakness of the neck muscles. Claimant may also benefit from the use of a light weight shoulder harness during periods of activity which may provide support to the shoulder. Claimant may also benefit from the use of a tennis elbow strap during periods of activity.

Dr. Fluter reviewed the task list of Robert Barnett and opined Claimant could no longer perform 4 out of 7 tasks, for a 57 percent task loss.

Dr. Terrence Pratt examined Claimant on July 2, 2018, at the request of the Court. Claimant had a chief complaint of discomfort involving the cervical region and right upper extremity. Claimant reported intermittent soreness on the right radiating from the head and to the shoulder blade. He does not believe that the symptoms radiate more distally from the cervical region. He had weakness and numbness in the right hand and numbness. He had exacerbation while sleeping and noted he cannot look up. He had palliation with rest. Claimant's right shoulder symptoms were continuous with numbness, and popping posterior of the aspect of the shoulder, with improvement since the surgery. It is exacerbated if he does too much and better with rest and use of ice packs. He had posterior right elbow intermittent numbness and also notes numbness of the middle through little fingers on the right intermittently. Symptoms are exacerbated while sleeping noting his whole hand can become numb, and better when he is holding the extremity straight down and moving it. He also reported chest wall discomfort on the right, noting it on the day of his event. He has symptoms intermittently starting in the axillary area moving on the right to under the breast with sharp pains. It is exacerbated if he does too much, and improved if he is on the floor stretching out.

Dr. Pratt noted Claimant has preexisting degenerative changes in the right shoulder along with the injury.

Dr. Pratt examined Claimant and diagnosed:

1. Cervicothoracic syndrome with degenerative disk disease.
2. History of right shoulder syndrome with apparent partial rotator cuff tear, AC joint arthrosis and chronic labral tear, status post reported labral debridement, arthroscopic subacromial decompression, partial acromioplasty, coracoacromialligament release, and arthroscopic distal clavicle resection.
3. Right elbow discomfort with negative MRI
4. Right chest wall discomfort.

Dr. Pratt found the work accident was the prevailing factor for Claimant's cervicothoracic soft tissue injury and the rotator cuff tear. He noted preexisting changes in the right shoulder not caused by the work accident. Dr. Pratt could not relate the chest wall discomfort to the work accident with any degree of reasonable medical certainty. According to Dr. Pratt, there were no significant findings on the MRI of the right elbow.

Dr. Pratt found Claimant had a 7 percent permanent partial impairment to the body as a whole. Dr. Pratt did not find any permanent partial impairment for the right elbow, using table 15-4, page 3/98 of *The Guides*. He found zero impairment because objective findings were not consistent, including range of motion limitations and clinical studies with negative MRI results. Dr. Pratt found 10 percent impairment to the right upper extremity for the shoulder. He utilized table 15-5, page 403 of *The Guides* because Claimant required surgery, which included a distal clavicle resection. This is a Class 1 abnormality with a mid level of 10. The functional history is grade modifier 1. Physical examination showed some limitations in range of motion but no significant circumference difference with a grade modifier 1. The net adjustment formula is $1-1+1-1+1-1$ or zero. The 10 percent impairment rating for the right shoulder converts to a 6 percent impairment rating to the body as a whole. Dr. Pratt found Claimant has 1 percent impairment to the cervical region utilizing table 17-2, page 564; table 17-6, page 575; table 17-7, page 581 and; table 17-9, page 581 of *The Guides*.

Dr. Pratt, in rating the right shoulder impairment, used a grade modifier 1 instead of a 2 because Claimant had findings related to the work accident but there were also findings preexisting the work accident. Dr. Pratt noted on the MRI were significant degenerative findings that causing impingement that contributing to the tear. Dr. Pratt could not say with a reasonable degree of medical certainty the tear in the right shoulder was solely caused by the work accident.

Dr. Pratt found no future medical treatment was anticipated in relationship to the injuries from the work accident.

Claimant still has pain in his right shoulder and does not have much grip strength. The only treatment Claimant received is for his right shoulder. He acknowledges right shoulder problems 10 years ago. Currently, Claimant does not take any prescription medication, only over-the-counter medication.

Claimant met with Robert Barnett, Ph.D. on October 12, 2018, for an vocational assessment. Claimant reported working light duty at the time and making \$11.20 an hour. Dr. Barnett found Claimant to have a 76 percent wage loss as a result. Dr. Barnett found Claimant had performed 7 tasks in the five years preceding the work accident.

Claimant met with Terry Cordray for a vocational assessment on February 21, 2019. Mr. Cordray was asked to provide an opinion on claimant's post-injury earning capacity. Mr.

Cordray noted Claimant was not working at the time of this interview, but was set to start a new job on March 4, 2019. Claimant's wages for this new job were \$20 an hour with no benefits. According to Mr. Cordray, with Claimant's new job his wage loss is minimal. Mr. Cordray identified 8 tasks Claimant had performed in the five years preceding the work accident.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2016 Supp. 44-508(h) states:

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2016 Supp. 44-510e(a) states in part:

In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.

...

(2)(B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein until January 1, 2015, but for injuries occurring on and after January 1, 2015, based on the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

(i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

(ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

Based on Claimant's attorney's statements at oral argument and his questioning of Dr. Pratt at Dr. Pratt's deposition, Claimant's primary argument concerns the ALJ's adoption of Dr. Pratt's impairment rating of 7 percent to the body as a whole. Claimant contends Dr. Pratt should have used grade modifier 2 in calculating his rating, which would have resulted in an impairment rating of 8 percent to the body as a whole and above the threshold of 7½ percent in order to be considered for a permanent partial general disability based on wage loss and task loss. Dr. Pratt used the grade modifier 1 because Claimant has preexisting arthritis and degeneration more than likely impacting Claimant's rotator cuff tear. Thus, according to Dr. Pratt, not all of Claimant's impairment was due to the work accident.

The Board finds Dr. Pratt's analysis persuasive. His rating accounts for Claimant's preexisting degeneration in his right shoulder not caused by the work accident. Also, Dr. Pratt's opinion was the result of a Court order and more neutral than opinions requested by the parties. For these reasons, the ALJ's decision is affirmed.

K.S.A. 2016 Supp. 44-510h(e) states:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

Two doctors opined Claimant did not require future medical treatment. Claimant is not taking any prescription medication in relation to his work injury. Therefore, Claimant's request for future medical treatment is denied.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Thomas Klein dated February 7, 2020, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2020.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Mitchell W. Rice, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Hon. Thomas Klein, Administrative Law Judge